IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7530 OF 2006

Tukaram Narayan Gaikwad
and others. ... Petitioners.

Versus.

Pandurang Ramchandra Jog
(since deceased, through LRs.)
Anand Pandurang Jog and others. ... Respondents.

Shri K.Y.Mandlik i/by Shri P.G.Chavan for the Petitioners.

Shri Uday Warunjikar for the Respondents Nos.1 to 3.

CORAM : ABHAY S.OKA, J.

DATED : 20th June, 2007.

P.C.:

1. Heard the learned Counsel appearing for the parties. The challenge in this petition under Article 227 of the Constitution of India is to the order dated 20th September 2006 passed by the learned trial Judge in an Execution Application filed by the Respondents herein. The Respondents are the decree holders and the Petitioners are the judgment-debtors. The issue decided by the impugned order is of limitation. The Petitioners filed an application at Exh.14 contending that the execution application was barred by limitation as the same was not filed within the stipulated period of 12 years.

2. The suit filed by the Respondents against the Petitioners is on the ground that the Petitioners were trespassers. The suit was decreed by judgment and decree dated 21st March 1987. It must be noted here that there was a suit filed by the Petitioners for declaration of tenancy and for injunction. The suit filed by the Petitioners seeking declaration of tenancy was dismissed. An appeal against the said decree was also dismissed. A writ petition arising out of the decree passed in the said suit being Writ Petition No.1751 of 1984 was decided by this Court on 18th June 1997. The said writ petition was allowed by this Court and this Court passed a decree holding that the Defendants are the tenants of the suit property and restrained the Respondents from disturbing the possession of the Petitioners otherwise than in accordance with the law. On an Application made by the Respondents, by order dated 10th July 2000, the order passed in the said writ petition was recalled and the petition was restored to file. It is not in dispute that the said petition was later on dismissed by this Court.

3. In so far as the decree which is sought to be executed is concerned, an Appeal was preferred by the Petitioners. The said Appeal was dismissed for default

on 9th March 1990. It is not in dispute that from 9th March 1970 till 2nd November 2002 there was no restraint order operating in the Appeal or in the proceedings pending for restoration of the Appeal preventing the Respondents from executing the decree for possession. It must also be noted that the Appeal was restored and again it was dismissed. An application for restoration thereafter made was also dismissed for default. Again an application was made for restoration in which an order of status-quo was passed on 2nd June 2002. The Application for execution was filed by the Respondents on 22nd October 2002.

4. The contention raised by the Petitioners before the executing Court was that from 9th March 1990, there was no stay or any restraint order preventing the execution of the decree and therefore, the execution application ought to have been filed within 12 years from 9th March 1990. The submission is that the execution application filed on 22nd October 2002 was obviously beyond the period of limitation.

5. Reliance was placed by the Respondents on the orders passed by this Court on 18th June 1997 in Writ Petition No.1751 of 1984 by which a decree for declaration was passed declaring the Petitioners to be the tenants and the Respondents were restrained from

taking possession of the suit premises otherwise than by due process of law. The said decree passed by this Court in Writ Petition was operating till the same was set aside on 10th July 2000 by restoring the writ petition. The contention is that from 18th July 1997 till 10th July 2000 the Respondents could not have executed the decree.

6. Shri Mandlik appearing for the Petitioners submits that the final order passed in Writ Petition No.1751 of 1984 permitted dispossession of the Petitioners by following due process of law. He submitted that by obtaining a decree for possession, the Respondents had already followed the due process of law and therefore, the order of the High Court did not prevent the Respondents from executing the decree. Finally my attention was invited to the findings recorded by the learned trial Judge in the impugned order. Shri Mandlik submitted that even going by the impugned order, the execution application was barred by limitation. He submitted that the order of the Executing Court is completely erroneous and the Court ought to have held that the execution application was barred by limitation.

7. I have carefully considered the submissions and also perused the records of the petition and the

documents forming part of the additional compilation. It can be safely stated that if the period from 18th June 1997 to 10th July 2000 i.e. from the date on which the Writ Petition No.1751 of 1984 was allowed till the date on which the order passed in the Writ Petition was set aside is excluded, then the execution application will be within the stipulated period of limitation of 12 years. If it is established that the said period cannot be excluded then it is obvious that the Application for execution will be barred by limitation.

8. It will be necessary to refer to the order dated 18th June 1997. By the said Judgment and order, the decree passed by the Courts below was set aside and a decree of declaration and injunction were passed in favour of the Petitioners. The operative part of the order of this Court reads thus:

> "It is declared that the plaintiffs are the tenants of two rooms tenements in House No.122/1 at Balwantashram, Chiplunkar Road, Pune-4, which is occupied by the plaintiffs. By this order the respondents are also restrained from disturbing the possession f the petitioners otherwise than in accordance with law. Rule is made absolute accordingly with no order as to costs."

The said order shows that this Court was aware of the fact that the Respondents have raised a contention that the predecessor of the Petitioners was never a tenant and he was only a domestic servant. The effect of the judgment and order dated 18th June 1997 is that there was a decree of declaration passed in favour of the Petitioners and there was a decree of injunction which restrained the Respondents from dispossessing the Petitioners otherwise than in accordance with law. The decree for perpetual injunction passed by this Court will have to be read along with the decree for declaration passed by this Court. The obvious meaning of the decree passed by this Court was that the Petitioners could not have been dispossessed by the Respondents without taking recourse to the remedy of filing a suit under the relevant Rent Control Legislation i.e. the Bombay Rents Hotel and Lodging House Rates Control Act, 1947. Even assuming that the said Act of 1947 was not applicable, the Petitioners could have been dispossessed only after determining their tenancy and obtaining a decree for possession by filing a suit under the provisions of the Transfer of Property Act, 1882. Thus the Respondents could not have dispossessed the Petitioners on the basis of a decree of the trial Court which held that the Petitioners were trespassers. In the light of the decree of declaration

passed by this Court, it is obvious that from the date of the judgment of this Court, the decree passed in the said suit filed by the Respondents could not have been executed. As stated earlier, the Judgment and order dated 18th June 1997 was set aside by the order dated 10th June 2000. It is thus apparent that from 18th July 1997 till 10th June 2000, the decree passed in favour of the Respondents could not have been executed. Therefore, it is obvious that the said period will have to be excluded while computing the period of limitation of 12 years. Though the impugned order may not be happily worded, going by the undisputed factual position, no fault can be found with the final order passed by the trial Court by which the objection regarding the bar of limitation was over-ruled. Hence there is no merit in the petition and the same is rejected with no order as to costs.

8. On the request made by the learned Counsel appearing for the Petitioners, ad-interim order passed by this Court on 11th January 2007 will continue to operate for a period of eight weeks from today, subject to condition that the Petitioners will not create any third party interests and will not part with the possession of the suit property.

Judge.